(2)

No. 98-880

Supreme Court, U.S.
FILED
JAN 15 1999
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

EMILIO FIGUEROA, DBA THE EXPORT GROUP,
Petitioner,

v.

MEXICAN COFFEE INSTITUTE,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

ROBERT E. HERZSTEIN
Counsel of Record
PERRY S. BECHKY
SHEARMAN & STERLING
801 Pennsylvania Ave., N.W.
Suite 900
Washington, D.C. 20004
(202) 508-8000

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

1698

QUESTION PRESENTED

Whether the court of appeals erred when it held that the district court properly exercised its discretion under Fed. R. Civ. P. 60(b)(6) to relieve a foreign sovereign from a two million dollar default judgment.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
STATUTE INVOLVED	2
STATEMENT	3
ARGUMENT	6
I. RULE 60(b)(6) GRANTS FEDERAL COURTS BROAD AUTHORITY TO DETERMINE THE MANNER IN WHICH THEY WILL EXERCISE THEIR DISCRETION TO SET ASIDE DEFAULT JUDGMENTS	6
II. THE NINTH AND ELEVENTH CIRCUITS ARE NOT IN CONFLICT OVER THEIR APPROACH TO REVIEWING DECISIONS TO SET ASIDE DEFAULT JUDGMENTS AGAINST FOREIGN SOVEREIGNS	8
III. THIS CASE IS NOT THE PROPER VEHICLE FOR THIS COURT TO PROVIDE FURTHER GUIDANCE ON RULE 60(b)(6)	9
CONCLUSION	11
APPENDIX	
Order, *The Export Group v. Reef Industries*, No. 83-5338, C.D. Cal. Sept. 20, 1995	1a

TABLE OF AUTHORITIES

Cases — Page

Ackermann v. United States, 340 U.S. 193, 71 S.Ct. 209, 95 L.Ed. 207 (1950) 10

The Export Group v. Reed Industries, 54 F.3d 1466 (9th Cir. 1995) 4

The Export Group v. Reed Industries, No. 96-55811, 1998 WL 384888, 1998 U.S. App. LEXIS 13606 (9th Cir. June 22, 1998) ..... *passim*

Falk v. Allen, 739 F.2d 461 (9th Cir. 1984) 10

Gregorian v. Izvestia, 871 F.2d 1515 (9th Cir. 1989) 9

Gross v. Stereo Component Systems, 700 F.2d 120 (3d Cir. 1983) 10

Jackson v. People's Republic of China, 794 F.2d 1490 (11th Cir. 1987) 8, 9, 10

Jackson v. The People's Republic of China, 596 F. Supp. 386 (N.D. Ala. 1984) 9

Klapprott v. United States, 335 U.S. 601, 69 S.Ct. 384, 93 L.Ed. 266 (1949) 6

Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 108 S.Ct. 2194, 100 L.Ed.2d 855 (1988) 6, 7 9

Pioneer Investment Services v. Brunswick Assoc. Ltd. Partnership, 507 U.S. 380, 113 S.Ct. 1489, 123 L.Ed.2d 74 (1993) 9, 10

United Coin Meter v. Seaboard Coastline R.R., 705 F.2d 839 (6th Cir. 1983) 11

Statutes

28 U.S.C. § 1254(1) 2

Fed. R. Civ. P. 55(c) 10

Fed. R. Civ. P. 60(b)(1) 9, 10, 11

Fed. R. Civ. P. 60(b)(3) 4, 5

Fed. R. Civ. P. 60(b)(4) 4

Fed. R. Civ. P. 60(b)(6) ..... *passim*

Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602 et seq. 4, 5, 9

Miscellaneous

12 James Wm. Moore et al., Moore's Federal Practice § 60.48[3][f] (3d ed. 1997) 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

No. 98-880

EMILIO FIGUEROA, DBA THE EXPORT GROUP,
Petitioner,

v.

MEXICAN COFFEE INSTITUTE,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals, Pet. App. A-1 to A-5, is not reported. It is available in table form at 152 F.3d 925. The text is available on electronic database services at 1998 WL 384888, 1998 U.S. App. LEXIS 13606. The opinion of the district court, Pet. App. A-30, is not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 22, 1998. Pet. App. A-1. The first petition for a writ of certiorari was filed on September 21, 1998, *sub nom. The Export Group and Emilio Figueroa v. The Mexican Coffee Institute.* This Court returned the petition. Mr. Figueroa subsequently filed a second petition for a writ of certiorari on November 27, 1998, *sub nom.*

Emilio Figueroa, dba The Export Group v. The Mexican Coffee Institute. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Fed. R. Civ. P. 60(b) provides:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

STATEMENT

This case involves a tort suit originally filed by The Export Group on June 24, 1983, in Orange County Superior Court in California. The suit sought to hold a number of parties liable for allegedly interfering with The Export Group's attempt to sell grain storage tarpaulins to defendant Almacenes Nacionales de Deposito, S.A. ("ANDSA"), a Mexican agency that warehoused grain. The Export Group asserted that defendant Javier Mora, who worked both for ANDSA and separately for other Mexican governmental agencies as their international representative, cut The Export Group out of the sale by arranging for ANDSA to make its purchase from Neuero Corporation rather than from The Export Group.

The original defendants removed the case to the United States District Court for the Central District of California. On November 19, 1984, The Export Group filed its First Amended Complaint (the "Complaint") in which it named as a defendant the Mexican Coffee Institute ("INMECAFE"), an instrumentality of the Government of Mexico that promoted coffee exports and that Javier Mora also happened to represent.[1] The Export Group alleged that INMECAFE had interfered with its prospective business advantage and contractual or business relations by acting "through its representative Mora" to arrange the sale between ANDSA and Neuero Corporation. All of the defendants who were involved in the tarpaulin transaction and did appear subsequently reached settlements with The Export Group and were dismissed. INMECAFE did not appear.

On May 22, 1985, The Export Group obtained a default from the district court clerk against INMECAFE. After entry of the default, the Government of Mexico, represented by the Mexican Consulate, appeared on be-

---

[1] Although INMECAFE remains the technical defendant in this case, INMECAFE was dissolved by federal decree published in the Mexican Government's "Diario Oficial" on June 1, 1993.

half of INMECAFE and moved to set the default aside on the ground that the district court lacked jurisdiction under the Foreign Sovereign Immunities Act ("FSIA") and because of the lack of personal service. On April 21, 1987, the district court denied this motion.

The Export Group failed to convert the default into a judgment until early 1991 when the district court threatened to dismiss for want of prosecution. On July 8, 1991, The Export Group obtained a default judgment in the amount of $2,032,795.49 on the basis of factual submissions to the court that INMECAFE "sanctioned" Mr. Mora's conduct. On June 4, 1992, INMECAFE filed a motion to set aside the default judgment on two grounds. First, it argued that the judgment was void under Fed. R. Civ. P. 60(b)(4) because the FSIA's bar on claims for interference with contractual relations precluded the court's jurisdiction. Second, it argued that the judgment should be set aside under clause Fed. R. Civ. P. 60(b)(3) because The Export Group had misled the court concerning the evidence of INMECAFE's liability.[2]

On May 21, 1993, the Honorable Terry J. Hatter, Jr., Judge of the United States District Court for the Central District of California—the same judge who originally had entered the default judgment—set aside the judgment pursuant to clause (b)(4) and *sua sponte* ordered the action dismissed as to INMECAFE. Judge Hatter held that the court lacked subject matter jurisdiction pursuant to the FSIA, 28 U.S.C. § 1605(a)(5)(B). However, on May 22, 1995, the court of appeals reversed, resolving "the confusing nature of the language and structure of 28 U.S.C. § 1605," *The Export Group v. Reed Industries,* 54 F.3d 1466, 1473 (9th Cir. 1995), Pet. App. A-18, and

---

[2] Specifically, The Export Group had represented in the Complaint that "the General Director of [INMECAFE] specifically sanctioned [Javier] Mora's attempts to undermine the bid." In fact, the procurement of grain storage supplies had nothing to do with Mr. Mora's coffee export duties for INMECAFE.

holding that the district court erred in extending sovereign immunity to claims for torts committed in the course of commercial activities. The court of appeals then remanded for consideration of the motion pursuant to clause (b)(3).

INMECAFE thereupon renewed its motion to set aside the default judgment. On September 20, 1995, Judge Hatter again vacated the default judgment against INMECAFE. Opp. App. 1a.[3] The Export Group filed its appeal of the order on October 20, 1995. Then on April 18, 1996, the court granted INMECAFE's motion for judgment on the pleadings, Pet. App. A-30, made on the ground that the two-year statute of limitations for actions on business torts barred The Export Group's Complaint against INMECAFE.[4] On May 24, 1996, The Export Group filed its appeal of this judgment.[5]

On June 22, 1998, the Ninth Circuit affirmed the district court's order setting aside the default judgment against INMECAFE and held that the district court did not abuse its discretion under Rule 60(b). *The Export Group*, Pet. App. A-3 to A-4. In affirming vacation of the judgment, the court of appeals first noted that "[t]he rule is remedial and should be applied liberally in favor of a defendant that 'seeks timely relief from the judgment and has a meritorious defense.' " Pet. App. A-3 (citation omitted). Turning to the specific circumstances before it, the court of appeals determined that the district court's decision was supported by three factors, namely (1) that INMECAFE "could reasonably have believed that it was immune from suit under the [FSIA]," (2) that INMECAFE had two

---

[3] "Opp. App." refers to the Appendix to Respondent's Brief in Opposition to Petition for a Writ of Certiorari.

[4] The court held that "[t]he two-year limitation period ran in November 1983—nearly a year before The Export Group named INMECAFE in its amended complaint." Pet. App. A-5.

[5] In both notices of appeal, Mr. Figueroa characterized his role as acting "Pro Se for Plaintiff The Export Group, a California Sole Ownership consisting of Emilio Figueroa."

meritorious defenses in "that it lacked vicarious liability [for Mr. Mora's actions and] . . . that the action was time-barred," and (3) that any prejudice to The Export Group resulted from its own actions. Pet. App. at A-3 to A-4. The court of appeals then affirmed the district court's granting of INMECAFE's motion for judgment on the pleadings on the ground that The Export Group's action was time-barred. Pet. App. at A-4 to A-5.

On September 21, 1998, Mr. Figueroa filed a petition for certiorari with this Court on behalf of The Export Group and himself in which he purported to represent both parties. The Clerk of this Court returned the petition due to Mr. Figueroa's "failure to comply with this Court's Rules of Procedure," including the prohibition against "represent[ing] anyone other than yourself in this Court." On November 27, 1998, Mr. Figueroa refiled his petition for certiorari purporting to represent "Emilio Figueroa, dba The Export Group."

ARGUMENT

I. RULE 60(b)(6) GRANTS FEDERAL COURTS BROAD AUTHORITY TO DETERMINE THE MANNER IN WHICH THEY WILL EXERCISE THEIR DISCRETION TO SET ASIDE DEFAULT JUDGMENTS

Clause (6) of Rule 60(b) expressly authorizes a court to set aside a judgment "for any other reason justifying relief from the operation of the judgment." Fed. R. Civ. P. 60(b)(6). In addition to the particular grounds otherwise enumerated in the rule, it provides an equitable authority upon which courts may rely to grant relief specifically tailored to the facts of the case. Accordingly, this Court has made clear that Rule 60(b)(6) "vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice." *Klapprott v. United States*, 335 U.S. 601, 615, 69 S.Ct. 384, 390, 93 L.Ed. 266 (1949). *Accord Liljeberg v.*

Health Services Acquisition Corp., 486 U.S. 847, 863, 108 S.Ct. 2194, 2204, 100 L.Ed.2d 855 (1988) ("Rule 60(b)(6) . . . grants federal courts broad authority to relieve a party from a final judgment 'upon such terms as are just' . . . .").

Mr. Figueroa's argument that courts must expressly invoke, Pet. 10, and must narrowly interpret the talismanic phrase of "extraordinary circumstances," Pet. 8, is flatly inconsistent with this Court's guidance with respect to the application of Rule 60(b). While this Court observed in *Liljeberg* that Rule 60(b)(6) "should only be applied in 'extraordinary circumstances,'" it rejected the more mechanical and "very strict interpretation of Rule 60(b)" advanced by the minority in that case, noting that "[t]he Rule does not particularize the factors that justify relief, but . . . provides courts with authority 'adequate to enable them to vacate judgments whenever such action is appropriate to accompilsh justice.'" *Liljeberg*, 486 U.S. at 863-64 (citations omitted); *id.* at 873 (dissenting opinion). Nothing in the jurisprudence since *Liljeberg* suggests the need or desirability for a rigid test that would straitjacket Rule 60(b)(6) in a manner inimical to its purpose. In the absence of such a rigid test, the court of appeals in the present case properly considered the order to set aside the default judgment using the three factors that it did.[6]

---

[6] Moreover, the result reached by the court of appeals here would be no different if the court had invoked explicitly the "extraordinary circumstances" talisman. Professor Moore notes approvingly that, according to some courts, including the Eleventh Circuit,

> [Q]uestions of sovereign immunity are so complex and have such important international complications that they probably should not be fully decided on a simple Rule 60(b) motion. If the sovereign immunity claims asserted in a Rule 60(b) motion are reasonable, these courts imply that, almost automatically, there are "extraordinary circumstances" that justify relief from a default judgment under Rule 60(b)(6) so that immunity questions may be fully presented at trial.

12 James Wm. Moore, Moore's Federal Practice § 60.48[3][f] (3d ed. 1997).

II. THE NINTH AND ELEVENTH CIRCUITS ARE NOT IN CONFLICT OVER THEIR APPROACH TO REVIEWING DECISIONS TO SET ASIDE DEFAULT JUDGMENTS AGAINST FOREIGN SOVEREIGNS

Mr. Figueroa wrongly argues that the decision below conflicts with the Eleventh Circuit's decision in *Jackson v. People's Republic of China*, 794 F.2d 1490 (11th Cir.), *cert. denied*, 480 U.S. 917, 107 S.Ct. 1371, 94 L.Ed.2d 687 (1987). Just as in this case, the court of appeals in *Jackson* affirmed the district court's decision to grant relief to a defaulting foreign sovereign under Rule 60(b)(6). The alleged conflict rests entirely upon the fact that the Eleventh Circuit "explicitly mentioned the extraordinary circumstances requirement," while the Ninth Circuit did not, Pet. 10. The courts, however, followed the same basic approach in reaching identical outcomes. The decisional principle applied by both circuits was the broad discretion to be accorded district courts in applying Rule 60(b)(6) to prevent injustice. *Compare Jackson*, 794 F.2d at 1496 ("Rule 60(b) power [is] discretionary and must be liberally construed to achieve substantial justice.") *with The Export Group*, Pet. App. A-3 ("[Rule 60(b)(6)] is remedial and should be applied liberally in favor of a defendant that 'seeks timely relief from the judgment and has a meritorious defense.'" (citation omitted)).

Accordingly, both circuits have rejected the kind of mechanical approach urged by Mr. Figueroa in favor of a close evaluation of the specific circumstances that governed the exercise of the district court's discretion. *Compare Jackson*, 794 F.2d at 1496 *with The Export Group*, Pet. App. A-3 to A-4. In each case, the court explicitly determined that the defendant had a meritorious defense. *Compare Jackson*, 794 F.2d at 1496 *with The Export Group*, Pet. App. A-3. Each court considered possible prejudice to the plaintiff.[7] Finally, each court addressed the culpa-

---

[7] *Compare The Export Group*, Pet. App. A-3 to A-4 ("The Export Group . . . created its own delay . . . . It cannot now complain of

bility of a defendant foreign sovereign with a reasonable but erroneous belief that it was immune from suit in the United States.[8]

In fact, the Ninth Circuit, instead of being in conflict with the Eleventh Circuit, relied upon the Eleventh Circuit's reasoning in *Jackson* to support its determination that INMECAFE's conduct was not culpable. *See The Export Group*, Pet. App. A-3 (citing the holding in *Gregorian v. Izvestia*, 871 F.2d 1515, 1525 (9th Cir.), *cert. denied*, 493 U.S. 891, 110 S.Ct. 237, 107 L.Ed.2d 188 (1989), which rested upon the determination that "[t]he Eleventh Circuit's opinion in *Jackson v. People's Republic of China* . . . provides authority counseling against a finding of 'culpable conduct' in the present case. . . . We are persuaded by the Eleventh Circuit's reasoning.").

III. THIS CASE IS NOT THE PROPER VEHICLE FOR THIS COURT TO PROVIDE FURTHER GUIDANCE ON RULE 60(b)(6)

Finally, this Court has already provided clear guidance on Mr. Figueroa's last question: that a grant of relief under Rule 60(b)(6) cannot be "premised on one of the grounds for relief enumerated in clauses (b)(1) through (b)(5)." *Liljeberg*, 486 U.S. at 863 & 864 n.11. *See also Pioneer Investment Services v. Brunswick Assoc. Ltd. Partnership*, 507 U.S. 380, 393, 113 S. Ct. 1489, 1497,

---

prejudice . . . .") *with Jackson*, 794 F.2d at 1496 (approving the lower court's "[b]alancing all interests," one of which had been that "the predecessors in interest of the plaintiff . . . had no expectation of any right to bring an action in a court of the United States," *Jackson v. The People's Republic of China*, 596 F. Supp. 386, 389 (N.D. Ala. 1984)).

[8] *Compare The Export Group*, Pet. App. A-3, (concluding that INMECAFE "could reasonably have believed that it was immune from suit under the [FSIA]") *with Jackson*, 794 F.2d at 1496-97 ("reject[ing] out of hand the contention that . . . China acts improperly in reserving what it conceives are its rights under international law.").

123 L.Ed.2d 74 (1993) ("These provisions are mutually exclusive . . . ."). In any event, this question is not presented by the facts of this case. Contrary to Mr. Figueroa's assertion, there is no evidence that "the Ninth Circuit granted INMECAFE relief from default for [Rule 60(b)(1)] 'excusable neglect,'" Pet. 8-9. "[F]or purposes of Rule 60(b), 'excusable neglect' is understood to encompass situations in which [the action] is attributable to negligence." *Pioneer Investment Services*, 507 U.S. at 394. *See also Ackermann v. United States*, 340 U.S. 193, 199, 71 S.Ct. 209, 212, 95 L.Ed. 207 (1950) (describing negligence in the context of Rule 60(b) as the "failure to [act] due to inadvertence, indifference, or careless disregard of consequences").[9] In the present case, the Ninth Circuit found no neglect in the foreign sovereign's decision not to enter an appearance but rather an affirmative and understandable decision made on the basis of the sovereign's reasonable belief in its own immunity. *The Export Group*, Pet. App. A-3. As a result, no question as to the exclusivity of clauses (b)(1) and (b)(6) is presented here.[10]

---

[9] *Cf. Jackson*, 794 F.2d at 1496 (distinguishing between "mistake, inadvertence, surprise, or excusable neglect" which can provide grounds for relief under Rule 60(b)(1) and the claim of a foreign sovereign to immunity from suit which the court found to be proper grounds for relief under Rule 60(b)(6)).

[10] Mr. Figueroa's contrary argument is based upon the Ninth Circuit's consideration of three factors that courts commonly use—irrespective of the applicable section of Rule 60(b)—to evaluate whether the moving party has shown good cause to set aside a judgment entered by default. *See* Fed. R. Civ. P. 55(c) ("For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b)."). *See also Falk v. Allen*, 739 F.2d 461, 463 (9th Cir. 1984) ("We agree with the Third Circuit that three factors should be evaluated in considering a motion to reopen a *default* judgment under Rule 60(b) . . . ." (emphasis added)); *Gross v. Stereo Component Systems*, 700 F.2d 120, 122 (3d Cir.

Moreover, even were this question presented here, this case would not be an appropriate one to use to address it. INMECAFE is a peripheral party without any direct role in the underlying transaction. Its only connection is that Javier Mora, the person alleged to have interfered directly in the sale to ANDSA, also happened to represent INMECAFE on other matters. As the district court correctly found, INMECAFE was added to the complaint after the statute of limitations had expired. The question also is clouded by foreign policy considerations due to INMECAFE's position as an instrumentality of the Mexican Government and the presence of issues regarding its immunity as a foreign sovereign.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

ROBERT E. HERZSTEIN
Counsel of Record
PERRY S. BECHKY
SHEARMAN & STERLING
801 Pennsylvania Ave., N.W.
Suite 900
Washington, D.C. 20004
(202) 508-8000

JANUARY 15, 1999

1983) ("[T]hree factors should be evaluated in considering a motion to reopen a *default* judgment under Rule 60(b) . . . ." (emphasis added)): *United Coin Meter v. Seaboard Coastline R.R.*, 705 F.2d 839, 845 (6th Cir. 1983) (adopting Third Circuit test). Thus, the consideration of these factors by the court below in no way indicates that the court was applying clause b(6) to a case of b(1) "excusable neglect."

APPENDIX

APPENDIX

[Filed Sep. 21, 1995]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CV 83-5338 TJH (Ex)

THE EXPORT GROUP,

Plaintiff,

v.

REEF INDUSTRIES, INC., *et al.*,

Defendants.

ORDER

The Court, has considered Defendant Mexican Coffee Institute's motion to set aside the default judgment entered on July 8, 1991, together with the moving and opposing papers.

IT IS ORDERED that the motion be, and hereby is, GRANTED.

Date: September 20, 1995

/s/ Terry J. Hatter, Jr.
TERRY J. HATTER, JR.
United States District Judge